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December 18, 1996

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Federal Communications Commission
Office of Secretary

via Hand Delivery

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: **Notice of written *ex parte* presentations**
800 MHz SMR Licensing
PR Docket No. 93-144

Dear Mr. Caton:

On December 18, 1996, the American Mobile Telecommunications Association, Inc. (AMTA), SMR WON, the Personal Communications Industry Association, Inc. (PCIA), the Industrial Telecommunications Association (ITA) and Nextel Communications, Inc. submitted joint written ex parte presentations concerning the above-captioned proceeding to the following FCC officials:

Chairman Reed E. Hundt and Counsel to the Chairman Julius Genachowski;

Commissioner James Quello and Senior Legal Adviser Rudolfo Baca;

Commissioner Rachelle Chong and Legal Advisor Suzanne Toller;

Commissioner Susan Ness and Legal Advisor David Siddall;

Wireless Telecommunications Bureau Chief Michele Farquhar.

A copy of the written presentation, consisting of documents concerning the industry consensus position on the licensing of the lower 230 800 MHz specialized

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William F. Caton, Acting Secretary

December 18, 1996

page 2

mobile radio (SMR) channels, is attached. Pursuant to Section 1.1206 of the Commission's Rules and Regulations, 47 C.F.R. § 1.1206, the original and a copy of this Notice, with enclosures, are submitted.

A handwritten signature in black ink, appearing to read "Jill M. Lyon", is written over a horizontal line.

Jill M. Lyon, Dir. of Regulatory Relations
AMTA

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Washington, D.C. 20036
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Part 90 of the)	
Commission's Rules to Facilitate)	PR Docket No. 93-144
Future Development of SMR Systems)	RM-8117, RM-8030
in the 800 MHz Frequency Band)	RM-8029
)	
Implementation of Sections 3(n))	
and 332 of the Communications Act)	GN Docket No. 93-252
)	
Regulatory Treatment of Mobile)	
Services)	
)	
Implementation of Section 309(j))	
of the Communications Act --)	PP Docket No. 93-253
Competitive Bidding)	

To: The Commission

JOINT REPLY COMMENTS OF SMR WON,
THE AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION
AND NEXTEL COMMUNICATIONS, INC.
ON THE SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

I. INTRODUCTION

Pursuant to Section 1.415 of the Rules of the Federal Communications Commission ("Commission") and the Second Further Notice Of Proposed Rule Making ("FNPRM") in PR Docket No. 93-144 ("the December 15 Order"),^{1/} the Coalition of SMR WON, the American Mobile Telecommunications Association ("AMTA") and Nextel Communications, Inc. ("Nextel") (collectively the "Coalition")

^{1/} Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, FCC 95-501, released December 15, 1995. On January 11, 1996, the Commission extended the Comment deadline from January 16 to February 15, and the Reply Comment deadline from January 25 to March 1, 1996. Public Notice, DA 96-2, released January 11, 1996.

respectfully submit Reply Comments in the above-referenced proceeding.^{2/}

SMR WON is a trade association of small business Specialized Mobile Radio ("SMR") incumbents operating in the 800 MHz band. AMTA is a "nationwide, non-profit trade association," representing the interests of specialized wireless interests including SMR licensees. Nextel is the largest provider of SMR services in the Nation, and all members of the Coalition are active participants in this proceeding.

After reviewing the approximately 36 comments filed herein, the Coalition found widespread industry consensus on the following issues:

(1) The Commission should adopt a pre-auction, channel-by-channel, Economic Area ("EA")-by-Economic Area, settlement process for the lower 230 channels.^{3/}

(2) Mutually exclusive applications in EAs that do not settle should be chosen through the auction of five-channel blocks on the lower 80 SMR channels and three 50-channel blocks on the 150 former General Category channels.

^{2/} The Coalition supports the industry's consensus proposal, as set forth in their individual comments and the comments of the Personal Communications Industry Association ("PCIA"), E.F. Johnson ("EFJ"), Pittencrieff Communications, Inc. ("PCI") and the U.S. Sugar Corporation ("U.S. Sugar"). Each member of the Coalition may submit individual Reply Comments, consistent with the positions taken herein.

^{3/} All incumbents on the lower 230 channels could participate in EA settlements and receive an EA license individually or as part of a settlement group. The participants in each EA settlement negotiation would be determined by whether their base station coordinates are located within the EA. In the case of certain channels which do not settle on an EA basis, the Coalition supports a competitive bidding entrepreneurial set-aside, as discussed below.

(3) When coupled with the EA settlement process, there is consensus for designating one 50-channel block and the 80 SMR channels as an entrepreneurial set aside, thus permitting anyone to participate in the auction of the two 50-channel former General Category blocks.^{4/}

(4) The Commission should encourage a cost sharing/cooperative arrangement among the upper 200-channel auction winners during the retuning process.

(5) Baseline requirements for achieving "comparable facilities" in the retuning process are delineated herein.

(6) There is industry support for the general concepts of the upper 200-channel auction and mandatory retuning/relocation process if coupled with the industry's proposed lower channel settlement process.

II. DISCUSSION

A. THE LOWER 80 AND 150 CHANNELS

1. The Comments Revealed Substantial Industry-Wide Support For A Pre-Auction, Channel-By-Channel Settlement Process On The Lower 230 Channels

The Coalition members each proposed a pre-auction settlement process designed to simplify the transition from site-by-site licensing to EA licensing, increase the value of the lower channels, prevent mutual exclusivity, and permit incumbents to continue developing their existing systems. The settlement process is necessary since, over the past "two decades of intensive development," the extensive shared use of the 150 former General

^{4/} The Coalition supports the Commission's decision to reclassify the 150 General Category channels as prospectively SMR only.

Category channels, in particular, has resulted in a "mosaic of overlapping coverage contours. . ."5/

Unlike the upper 200 channels, wherein each license was granted for five to 20 channels, the lower 150 channels were licensed on an individual basis often for shared use. This licensing "hodgepodge" makes the lower channels most useful to licensees already operating thereon, including the retuned/relocated upper 200 channel incumbents.

The Coalition, as well as E.F. Johnson, PCIA, Pittencrieff Communications, Inc. and the U.S. Sugar Corporation expressly support pre-auction EA settlements as follows: if there is a single licensee on the channel within the EA, it would have the right to apply for and be awarded an EA license. If there are several licensees on a single channel within the EA, they would receive a single EA license for that channel under any agreed-upon business arrangement, e.g., a partnership, joint venture, or consortia.6/ The Coalition's proposed EA settlement process, therefore, would eliminate mutual exclusivity for the "settled"

5/ See Comments of AMTA at p. 19. Given the Commission's decision in the First Report and Order to re-categorize the 150 former General Category channels as SMR channels prospectively, and its proposal to license them on an EA basis through auctions, the Commission appears to have eliminated the conventional channel classification. These channels should be prospectively available for trunked use.

6/ AMTA at p. 10; EFJ at p. 8; PCIA at p. 17; PCI at pp. 8-9; SMR WON at pp. 9-11; and U.S. Sugar at p. 13. The Coalition does not fundamentally disagree with the partial EA settlement process outlined in the Comments of SMR WON. See SMR WON at p. 10.

channel and make it unnecessary to use competitive bidding licensing procedures.

While not expressly addressing the above proposal, the City of Coral Gables, Florida ("Coral Gables"), Entergy Services, Inc. ("Entergy"), and Fresno Mobile Radio, Inc. ("Fresno") recognize the necessity of a pre-auction settlement. Each highlighted the complexities and limited utility of auctioning spectrum that is, as Coral Gables described it, an "overcrowded hodgepodge."^{7/} A pre-auction EA settlement would remedy their concerns.

UTC, the Telecommunications Association ("UTC") stated that public utilities, pipeline companies and public safety entities are legally foreclosed from using their financial resources for competitive bidding since they do not use the spectrum to generate revenues.^{8/} Many are funded by states, localities and municipalities, or citizen ratepayers, which limits their authority to engage in auctions.^{9/} Pre-auction settlements would assure that public utilities and public safety organizations can participate in EA licensing of the lower channels instead of relegating them to continued site-by-site licensing, thereby precluding their expansion while the rest of the industry moves to

^{7/} Coral Gables at p. 6 (lower 230 channels are such an "overcrowded hodgepodge" that, without the settlement of as many channels as possible, whoever wins the auction would "owe so much protection to so many incumbents over so much of the market" that the geographic license will be of little value to the winner). See also Entergy at pp. 8-9; Fresno at p. 23.

^{8/} UTC at p. 13.

^{9/} *Id.*

geographic-based licensing. While the Coalition agrees that these hurdles are solved by retuning/relocation on the upper 200 channels, the Coalition also supports the Commission's tentative conclusion that such retuning/relocation is not feasible on the lower channels.

2. Pre-Auction Settlements Comply With Section 309(j) Of The Communications Act of 1934

Permitting pre-auction EA settlements fully complies with the competitive bidding provisions of Section 309(j) of the Communications Act of 1934 ("Communications Act").^{10/} In fact, it would expressly carry out the Commission's duty to take necessary measures, in the public interest, to avoid mutual exclusivity. Section 309(j)(6)(E) requires that the Commission "use . . . negotiation, threshold qualifications, . . . and other means in order to avoid mutual exclusivity in application and licensing proceedings."^{11/} The settlement proposal is just that: a threshold qualification/eligibility limitation and a Commission-endorsed negotiation process that establishes a regulatory framework to avoid mutually exclusive applications for EA licenses on the lower 230 SMR channels.

Section 309(j) of the Act authorizes the Commission to select among mutually exclusive applications for radio licenses. At various times, and to further different public policy objectives, Congress has instructed the Commission to select such applications

^{10/} 47 U.S.C. Section 309(j).

^{11/} 47 U.S.C. Section 309(j)(6)(E).

through comparative hearings, random selection procedures and, most recently, competitive bidding. These assignment processes are unnecessary, however, if the applicants can avoid mutually exclusive applications. Granting a single channel EA license to settling incumbents on the lower 230 SMR channels is fully consistent with the Commission's Section 309(j) competitive bidding authority because it fulfills Section 309(j)(6)(E), as explained above, by establishing a mechanism to avoid mutual exclusivity. Permitting pre-auction EA settlements would facilitate the expeditious transition of lower SMR channel incumbents from site-by-site to EA licensing wherever possible, with auctions used only for EA licensees where mutual exclusivity persists.

Moreover, adopting a threshold eligibility limitation to promote pre-auction, channel-by-channel EA settlements among incumbents (including retunees) is in the public interest because (1) the spectrum is heavily licensed, most often on a channel-by-channel or shared-used basis, and is therefore of little value to non-incumbents; (2) it would speed licensing and delivery of new services to the public;^{12/} and (3) it would not foreclose new entrants from the SMR industry. New entrants could still bid on

^{12/} PCIA requests that the Commission postpone the lower channel licensing until the construction deadlines for all incumbent systems have passed. PCIA at p. 18. The Coalition disagrees. This would delay the ability of numerous SMR providers to obtain geographic area licenses, thereby slowing the provision of new services to the public. These delays are not justified by PCIA's speculation that channels may become available after construction deadlines lapse. If an incumbent fails to timely construct a station, those channels should revert automatically to the EA licensee(s) for those channels.

lower channel EA licenses that do not settle, or the upper 200-channel EAs, and they could participate through mergers, partnerships and/or buyouts of existing SMR companies.

Further, the EA settlement process is necessary to transition the lower channels to geographic licensing in light of existing incumbent operations. Unlike the upper 200 channels, where the Commission has properly recognized that incumbents can and will be relocated to permit EA licensees to introduce new technologies and services requiring contiguous spectrum, there is no possibility of retuning incumbents from the lower channels. Given this, the EA settlement proposal affords a mechanism to incorporate the existing and future operations of lower channel incumbents -- taking into account shared authorizations and the non-contiguous lower 80 SMR channels -- within the transition to geographic area licensing. Additionally, the EA settlement process will assist the voluntary retuning from the upper 200 channels by providing retuned incumbents access to geographic-based licenses.

There is sound Commission precedent for limiting lower channel EA settlements to incumbent carriers. The Commission granted initial cellular licenses on a geographic basis with two blocks in each area. Eligibility on one block was limited to wireline telephone companies to assure telephone company cellular participation.^{13/} If the local telephone companies were unable

^{13/} Under state regulation at the time, local telephone companies had defined monopoly service areas, thereby limiting the number of telephone company eligibles in each cellular licensing area.

to settle, the Commission granted the license by lottery, pursuant to its then-existing licensing authority under Section 309(j).^{14/} In many cases, the incumbent telephone companies did settle, avoiding random selection, and the licensee speedily initiated new service to consumers.^{15/}

The proposed lower channel EA settlement process is comparable to initial cellular licensing, albeit the unresolved mutually exclusive incumbent applications would be chosen by auction rather than lottery. There are compelling, public interest justifications for limiting pre-auction lower-channel SMR settlements to incumbents, as discussed above, just as there was for the cellular wireline set-aside. If the SMR incumbents do not settle, then the EA license would be subject to mutually exclusive applications and auctioned, just as mutually exclusive cellular applications were subject to a lottery. In fact, the proposed EA settlement process is more inclusive than was cellular licensing since any applicant (or at least any small business) could bid on unsettled EAs; only telephone companies in the geographic area could apply for the cellular wireline license.

^{14/} Cellular Lottery Decision, 98 FCC 2d 175 (1984).

^{15/} The Commission recently proposed a similar eligibility limitation in its Advanced Television ("ATV") licensing proceeding. Therein the Commission proposed to limit eligibility by allowing incumbent broadcasters to "have the first opportunity to acquire ATV channels." Fourth Notice Of Proposed Rule Making and Third Notice of Inquiry, MM Docket No. 87-268, 10 FCC Rcd 10540 (1995) at para. 25.

3. The Commission's Proposed Set-Aside

A number of parties opposed the Commission's proposal to set aside all lower 230 channels as an entrepreneur's block.^{16/} They assert that an entrepreneurial set-aside could prevent lower channel incumbents from bidding on the very spectrum on which they are operating and serving the public today since many incumbents would not meet the proposed small business revenue ceilings.

The Coalition agrees that denying incumbents the right to participate in the auction not only precludes their ability to expand and potentially enhance their operations, but it also denies them the ability to protect their existing operations while others could essentially "land-lock" them by obtaining the EA license. EA settlements would enable these incumbents to continue offering services and to grow their businesses.

Other commenters supported the entrepreneurial set-aside concept because it would provide specific opportunities for small SMR businesses,^{17/} and the Coalition has agreed to support an

^{16/} UTC at p. 14 (set aside "further compound[s] the unfairness of the reallocation of the channels for commercial service" because most public utilities and pipeline companies have gross annual revenues far above any proposed "small business" limitation); PCI at p. 11 (opposed to an entrepreneur's block that applies the financial criteria to incumbents); Entergy at p. 11 (denies large incumbents, i.e., all utilities and pipeline companies, the ability to bid on the very license on which they are now operating, thereby denying them the right to protect their assets); Telcelcellular de Puerto Rico, Inc. ("Telcelcellular") at p. 1; Southern Company at p. 16 ("prevents some incumbents who desire to retain their channels from participating in the auctions"); and EFJ at p. 9 ("fundamentally unfair to prohibit entities from participating in such an auction if they already hold channels in an EA.")

^{17/} See, e.g., Fresno at pp. 28-29; SMR WON at p. 24.

entrepreneurial set-aside limited to the lower 80 channels and one of the 50-channel blocks in conjunction with Commission adoption of the industry EA settlement proposal described above. The set-aside would apply only to eligibility to bid on lower 230 channels which are not settled among the existing incumbents (including retunees) and which therefore must be licensed through competitive bidding. All lower 230 channel incumbents would be eligible to participate in the pre-auction EA settlement process and to receive EA licenses either individually or as part of a settlement group.

B. THE UPPER 200 CHANNELS

As noted above, many industry participants will support the general concepts of the Commission's upper 200 SMR channel EA licensing auction and relocation decisions, as set forth in the First Report and Order, if the Commission adopts the pre-auction EA settlement process for the lower 230 SMR channels discussed herein. A consensus of commenters assert that these approaches, taken together, reasonably balance the needs of all SMR providers and will facilitate a more competitive SMR/CMRS industry. This includes relocation of upper 200-channel incumbents to the lower channels where they would become incumbents with the right to negotiate and settle out their channels to obtain EA licenses.

There are, however, a few aspects of the relocation process that warrant further discussion: (1) cost sharing/cooperation among EA licensees; (2) using Alternative Dispute Resolution

("ADR") to resolve relocation disputes; and (3) the specifics of determining "comparable facilities" and "actual costs."^{18/}

1. Cost Sharing/Cooperation Among EA Licensees

Several commenters supported the Commission's proposed cost sharing plan for EA licensees and the requirement that EA licensees collectively negotiate with the affected incumbents.^{19/} Such collective negotiations, they argued, would "facilitate the relocation process."^{20/}

The Coalition and other commenters agree that an EA licensee should not be able to delay or stop the relocation process for all affected EA licensees because it cannot or does not desire to retune/relocate an incumbent. Both AMTA and PCI proposed that those EA licensees who choose to retune/relocate an incumbent should be permitted to retune/relocate the entire system -- even those channels located in a non-participating EA licensee's block.^{21/} This would prevent a situation where, for example, Licensee A is not interested in retuning the channels of an

^{18/} There was significant agreement among commenters that partitioning and disaggregation should be permitted on the upper 200 channel blocks. See AMTA at p. 8; EFJ at p. 3; Genesee Business Radio Systems, Inc. at p. 2; Sierra Electronics at p. 1; and PCIA at p. 23. Only one party voiced opposition to either proposal. See Fresno at p. 3 (sublicensing should not be permitted due to the complexities it could create).

^{19/} See, e.g., AMTA at p. 11; Fresno at p. 15; PCI at p. 5; Digital Radio at p. 3; and Industrial Telecommunications Association ("ITA") at p. 11.

^{20/} Digital Radio at p. 3; SMR Systems, Inc. ("SSI") at p. 3; UTC at p. 7.

^{21/} AMTA at p. 11.

incumbent within its channel block.^{22/} Licensee B and Licensee C, on the other hand, who also have a portion of the incumbent's system in their blocks, want to retune/relocate that same incumbent. Without some preventive mechanism, Licensee A's refusal to retune/relocate could result in no relocation by anyone since the incumbent's entire system must be relocated.

Licensees B and C, therefore, should be permitted to relocate the incumbent's entire system by offering the incumbent their channels in the lower 80 or the 150 to account for the channel(s) in Licensee A's block. After the retuning/relocation is complete, Licensees B and C, who retuned the incumbent off Licensee A's channels, would "succeed to all rights held by the incumbent vis-a-vis" Licensee A.^{23/} Without this flexibility, relocation could be unnecessarily delayed and protracted.^{24/}

2. Alternative Dispute Resolution

The comments exhibited mixed reactions to the Commission's proposal to employ ADR during the relocation process. The Coalition believes that a properly-designed ADR system can meet all concerns. It is imperative -- as AMTA pointed out -- that there be several arbitration choices.^{25/} No arbiter should be used unless all parties agree. Moreover, all ADR decisions must be

^{22/} Or perhaps the 20-channel block licensee does not have lower 80 and 150 channels suitable for retuning that particular incumbent.

^{23/} *Id.* See also Comments of Nextel at pp. 18-20; PCI at 5.

^{24/} Nextel at p. 18.

^{25/} AMTA at p. 14; Nextel at p. 23.

appealable to the Commission and other appropriate agencies, and all ADR costs should be resolved by the arbiter as part of the ADR process.^{26/}

3. Comparable Facilities

Most of the industry agrees that "comparable facilities" generally require that "a system will perform tomorrow at least as well as it did yesterday."^{27/} There was significant agreement that comparable facilities must include (1) the same number of channels, (2) relocation of the entire system, and (3) the same 40 dBu contour as the original system.^{28/}

Critical to the definition of comparable facilities is the definition of a "system," which should be defined as a base station or stations and those mobiles that regularly operate on those stations. A base station would be considered located in the EA specified by its coordinates, notwithstanding the fact that its service area may include adjacent geographic EAs.^{29/} A multiple base station system, by definition, could encompass multiple EAs.

^{26/} *Id.*

^{27/} See AMTA at p. 15.

^{28/} AMTA at p. 15; Digital Radio at p. 6; EFJ at p. 5; GP and Partners at p. 3; Industrial Communications and Electronics at p. 7; SSI at p. 7; and UTC at p. 9. The Coalition does not fundamentally disagree with SMR WON's position that the "new 22 dBu contour match the original system 22 dBu contour." SMR WON at p. 30.

^{29/} See Nextel at p. 22. See also AMTA at p. 16 ("system" includes "any base station facility(s) which are utilized by mobiles on an inter-related basis, and the mobiles that operate on them."); PCI at p. 7 ("system" should be limited to those mobile units that regularly operate only on those base stations within the EA licensee's EA.)

One commenter, Centennial Telecommunications, Inc. ("CTI"), suggests that a "system" should be defined as all frequencies that are part of a licensee's wide-area system, including those at unconstructed sites and sites licensed to other, unaffiliated, parties.^{30/} CTI's proposal is illogical, unreasonably expansive and absurd. It would potentially require the retuning of sites/stations that are unconstructed, not affiliated or interoperable with the retunee's system.

III. CONCLUSION

The Coalition supports the Commission's tentative conclusion to license the lower 230 SMR channels on a geographic area basis. To simplify the transition from site-by-site licensing, speed the licensing process, and avoid mutually exclusive applications, the Commission should adopt the industry's pre-auction EA settlement process for the lower channels. The threshold eligibility limitations and the other modifications discussed herein, in combination with the rules adopted in the First Report and Order and the Eighth Report and Order, strike a fair balance for all existing and future SMR providers to transition to geographic-area based licensing and more efficient spectrum use. This will further

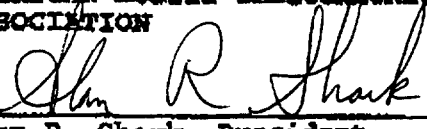
^{30/} CTI at p. 6. In fact, in the attachment to CTI's pleading, it suggests that a site owned and operated by Nextel should be retuned as part of CTI's "system." See Exhibit A, Comments of CTI. Dial Call, Inc., listed thereon, is a wholly owned subsidiary of Nextel.

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fulfill the Commission's regulatory parity mandate and promote competition among all CMRS competitors.

Respectfully submitted,

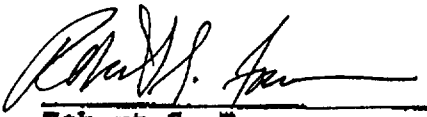
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Dated: March 1, 1996

Questions Concerning the 800 MHz Industry Consensus Plan

Since the negotiation among industry participants which led to the filing of Joint Comments and the 800 MHz industry consensus plan, many questions have been asked concerning possible ramifications to the industry, the FCC, potential new 800 MHz entrants and the public. The following dialogue is an effort to answer these questions.

1. Why should the FCC implement a proposal that serves to delay and/or avoid an auction of 800 MHz spectrum?

The industry consensus proposal meets several important needs of both the FCC and the SMR industry. As such, the consensus parties believe this is a "win-win" opportunity to end a protracted dispute over this heavily encumbered, long-licensed spectrum.

To begin, the consensus plan would not avoid an auction of either the upper 200 channels or the lower 230 800 MHz SMR channels. In fact, the parties hope that the auction of the upper 200 channels would take place as soon as possible following implementation of new rules, since the plan assumes that the upper band auction will be completed before final licensing or auctioning of all lower band channels. Consensus parties, including most of the 800 MHz industry, have conditioned their

support for the upper-band auction and retuning/relocation on the FCC's implementation of the plan. The pre-auction "channel swap" negotiations now underway among incumbents, post-auction retuning/relocation from upper band channels and the EA settlement process are closely intertwined -- they cannot successfully progress piecemeal.

Following the end of the first auction, in accordance with the rules announced in December, 1995, EA licensees would notify those incumbent licensees they plan to retune/relocate from the upper 200 channels within their newly-licensed blocks.

Implementation of the consensus plan provides a strong incentive to accelerate voluntary negotiation of those relocations both before and after the upper-band auction, since the EA settlement process provides the only opportunity for displaced incumbents to gain some measure of enhanced flexibility for their systems on their "new" channels.

The consensus parties contemplate that EA settlements will be completed and the resulting applications to the Commission will be filed during a pre-determined period. Thus, auction of remaining lower-band channels would not be delayed significantly.

2. What benefits to small businesses arise from the consensus

proposal?

As the consensus parties have repeatedly outlined, the proposal provides significant benefits to truly small businesses. Surveys have revealed that most incumbent SMR businesses, and almost all that will be retuned/relocated from the upper channels, have gross revenues of less than three million dollars per year. The plan also benefits the hundreds of private licensees, many of which also are very small businesses, now holding authorizations to operate on formerly General Category channels.

The FCC has recognized its congressional mandate to consider the impact of its regulations on small businesses. Incumbent, small business SMR licensees, many of which have been serving local communities for fifteen years or more, have been unable to expand their systems through licensing of additional channels, or even *de minimis* geographic expansion, for between 14 months and nearly 2 ½ years. While their ability to expand their service coverage is inherently limited because of the heavily encumbered status of these channels in all but the most rural areas, these licensees, nonetheless, are eager to respond to pent-up customer demand for improved coverage to the extent even minimal expansion opportunities are available.

However, the consensus plan provides no free lunch for small businesses. While the EA settlement

proposal may allow some nominal, long-needed growth in service areas, it requires that all licensees on each frequency, both commercial and private, successfully work together. The plan contemplates only one application per channel in each EA. Given the substantial number of existing licensees on these channels, this will often require successful negotiation among several parties, especially after the retuning/relocation of upper-200 operators to the lower band.

3. Wouldn't partitioning and disaggregation flexibility in the 800 MHz upper band or in other frequency bands provide adequately for small businesses?

No. Flexible partitioning and disaggregation of geographic-area licenses does speed the provision of service to less-developed areas, since auction winners often concentrate their initial construction efforts in urban areas. However, it is *not* an effective means of satisfying the FCC's obligations to small businesses in general and is especially ineffective for incumbent licensees in this frequency band.

The likelihood is great that geographic-area licensees in any service will make only their least-desirable geography available to a partitionee. Should the Commission rely on partitioning for small business relief, this guarantees that small business would be relegated to the least-

desirable areas of the country. It is a generally unacceptable outcome, and especially so to incumbent urban licensees, which would be unable to obtain additional spectrum in their existing service areas.

The small amount of spectrum contemplated for SMR auction blocks makes it unlikely that EA licensees will readily offer disaggregated spectrum. Thus, partitioning and disaggregation are not acceptable means for the discharge of the Commission's obligations.

4. How do 800 MHz subscribers benefit from this plan?

The long freeze on 800 MHz licensing has led to situations all over the country, in both urban and rural settings, in which existing operators are unable to add a single new user to their systems. In some cases, there is not even sufficient room to accommodate the expanded fleets of existing subscribers. Prospective customers have been forced to opt for cellular service (or PCS, where available) which may not meet their dispatch-oriented needs, or to obtain their own private-system licenses. These alternatives typically are more expensive or of lower service quality than SMR service.

The freezes, coupled with uncertainty concerning regulation of the industry, has also led to less technological development. Manufacturers have been hesitant to introduce new features in a period of

low equipment sales, and equipment prices have remained higher than may otherwise have occurred due to lower demand. Such costs must be passed on to users.

Implementation of the consensus plan ends the long period of uncertainty with a licensing framework that, while less than perfect, is supported by the large majority of the industry. With the auction of the upper-band channels, tied closely to more rapid migration and an equitable solution for lower-band operators, the entire industry can move forward once more in serving customers, both through traditional SMR service and in the implementation of advanced networks. Customers are the primary benefactors from a more readily available, efficient and less-costly communications service.

5. Doesn't the consensus plan limit opportunities for new entrants into the 800 MHz SMR industry?

The consensus plan has little, if any, impact on the availability of spectrum to new entrants in the 800 MHz band.

With the reallocation of the 150 General Category channels to the SMR service, this band *totals* 430 channel pairs, less spectrum than is held by each of two cellular licensees in every market. This spectrum is already shared by thousands of licensees. Research by the consensus parties shows that none of these channels is

clear throughout the country. Indeed, many are occupied so extensively nationwide that they would offer no meaningful opportunity for a viable commercial system.

The Commission has implemented rules that provide for retuning/relocation of upper-band systems to other channels, and has crafted auction rules that provide eligibility for all entities interested in participating. The consensus parties submit that these measures provide the best opportunity for new entrants in the 800 MHz SMR band; the heavily encumbered nature of the band otherwise provides little opportunity for enough "clear" spectrum blocks to create viable systems.

Especially after the retuning/relocation process, the lower-band channels, with their thousands of systems entitled to interference protection, will have little, if any, value to a new entrant regardless of the rules adopted for the lower channels. However, the consensus plan does provide for auction of unoccupied channels, or those on which incumbents cannot come to agreement.

6. Wouldn't implementation of the consensus plan create a precedent for other FCC proceedings, particularly that concerning the paging services?

SMR spectrum and the SMR proceeding are unique in several respects, and different enough from the

state of the paging industry that no binding precedent need be assumed.

First, the 800 MHz industry consensus plan proposes a solution for heavily-congested channels that will house many systems that have been retuned/relocated from other parts of the band. The FCC has not proposed mandatory retuning/relocation for incumbent paging operators.

Second, the SMR industry has come to its present condition after a long licensing freeze that has halted expansion for many service providers, and even curtailed the ability to modify existing facilities. In contrast, the paging industry has shown tremendous growth over recent years. The paging "freeze" has existed for less than a year and includes a provision that permits incumbent operators to continue to add stations within forty miles of all their licensed, operational facilities. Thus, paging operators have not been denied an opportunity to pursue expansion plans that SMR providers are now requesting.

7. Is there a reasonable alternative to the consensus plan?

The consensus parties know of no alternative to the industry plan that would not be administratively burdensome for the Commission or inequitable to licensees.

The 230 channels of the lower 800 MHz band are licensed in a widely varying manner. In addition, the FCC database shows that there is no "white

space" between licensed stations in any population center suitable for creation of a viable system by a non-incumbent successful bidder. The consensus plan puts the burden of determining the location of all systems on the shoulders of the industry through the EA settlement process. It also provides an incentive for EA licensees and incumbents to come to agreement quickly on swapping upper for lower band operations, where site-based licensing is rarely identical.

The FCC is already familiar with the complexity of PCS/microwave relocation, a process that involved far fewer systems than operate in the 800 MHz band, systems used only for internal, not commercial communications, and systems that were not owned by business competitors. The consensus plan provides a tangible incentive for incumbents to relocate voluntarily and expeditiously, without the need for FCC involvement.

Further, nowhere else has the FCC proposed to hold an auction of spectrum that serves as the new home for licensees displaced by a previous auction. Such an inequitable prospect would result in a *second* occasion in which these licensees would be prevented from expanding their businesses.

8. What other action do the consensus parties contemplate in support of the plan?

With the return of members of Congress to Washington following November elections, the consensus parties expect to garner more support for their proposal in both the U.S. House of Representatives and the Senate. As the Commission is aware, 23 members of the House telecommunications subcommittee, from both political parties, signed a letter in support of the plan just prior to the close of Congress. Other letters of support have come from Senate Majority Leader Trent Lott (R-Miss.) and Senate communications subcommittee chairman Conrad Burns (R-Mont.). Given the benefits of the plan to small businesses and the fact that it meets the congressional mandate of avoiding mutually exclusive applications in an existing service, the parties are confident that additional support will be forthcoming.

Consensus parties are aware that a small number of SMR licensees has linked together to form a group that promises a court challenge to 800 MHz spectrum auctions. The parties do not contemplate joining any such action at this time.

9. If the consensus proposal is not unanimously supported, why is the agreement important?

As the Commission is aware, this proposal represents resolution of severe disagreement among segments of the SMR industry that lasted for many months. Moreover, it is an example of

industry consensus on difficult issues such has been requested by the FCC itself.

Given the amount of contention over the imposition of geographic-area licensing and auctions on a heavily-licensed frequency band, unanimous support of any plan is impossible. As stated at the beginning of this document, the consensus parties believe the proposal offers the best alternative for an industry seeking to continue its tradition of service to the public and regain a competitive status, for the FCC in enhancing competition and providing valuable services to the public, and for new entrants seeking the best opportunities for 800 MHz spectrum. The consensus plan is a win-win proposal. We urge the Commission to show support for the industry's efforts by implementing this consensus.